A

PP

v.

ONG SEH SEN

B

HIGH COURT MALAYA, SHAH ALAM
ABANG ISKANDAR ABANG HASHIM JC
[CRIMINAL APPEAL NO: 42-82-2007]
11 FEBRUARY 2008

C ***CRIMINAL LAW:*** *Money laundering - Sentence - Two years' imprisonment and RM1 million penalty fine for offence under s. 4(1) Anti-Money Laundering Act 2001 - Whether sentence excessive by sessions judge*

D The appellant was sentenced to two years' imprisonment and imposed a penalty fine of RM1 million or in default 12 months' imprisonment for an offence under s. 4(1) of the Anti-Money Laundering Act 2001 ('AMLA'). He had pleaded guilty to the offence. He was found to have forged 75 invoices belonging to a E company owned by him as a cover up to account for the proceeds of an illegal betting on the English Premier League matches. The proceeds amounted to a sum of RM1,372,359 which were banked into the company's bank account with Maybank. Out of that sum, RM1 million was expended by the appellant. In this appeal, the F appellant submitted, amongst others, that the sentence of imprisonment was misconceived as under s. 4(1) AMLA the punishments were arranged in the order where the imposition of fine came before the term of imprisonment. As such, the sessions judge ought to have imposed a fine in the first instance and not the G imprisonment. It was also submitted that the sentence imposed was excessive and so too the penalty fine.

Held (dismissing the appeal):

(1) The fact that Parliament provided for an option of a fine as H one of the modes of punishment, only meant that it envisaged that there might exist, in a case, some compelling and extenuating circumstances which could justify or warrant the sentencing court to choose to impose a sentence of a mere fine. A sentencing court need not impose a sentence of I a fine over a sentence of an imprisonment in a case just on

account of the sequence in the arrangement of the punishments in the relevant provisions and especially so where the circumstances did not warrant the imposition of a fine as a mode of punishment (*Lim Guan Eng v. PP*; refd). (para 8)

(2) There was no merit in the appellant's submission that the sentence of imprisonment should not be imposed because there was no violence in the crime committed by him. There was no mention in s. 4(1) AMLA that a sentence of imprisonment must only be meted out if the offence that was committed involved an element of violence. (para 8)

(3) The appellant's plea of not benefitting from the offence had no merit when in fact he expended RM1 million of the ill-gotten monies. It did not matter that no criminal breach of trust was involved in the commission of the offence by the appellant. There was no reason why the offence committed by the appellant should or ought not to be caught squarely by the penalty provisions, including imprisonment under s. 4(1) AMLA. (para 8)

(4) The sessions judge did not err in imposing the sentence of imprisonment in preference over an imposition of a fine. Based on the facts of the case, the offence committed by the appellant could not be sufficiently dealt with by a mere imposition of a fine. A deterrent sentence was in order and a sentence of a fine was not deterrent enough for this kind of offence involving laundering of proceeds derived from illegal gambling activities of such magnitude. Based on the nature of the offence committed and the magnitude involved, public interest would only be served effectively by the court imposing a term of imprisonment upon the appellant. The sessions judge did not err when she did not consider imposing a bond under s. 294 CPC against the appellant as the facts did not call for such a consideration. (para 8)

(5) The fact that an offender is a first offender and that he pleaded guilty did not mean that he deserved a lenient sentence in the form of a fine. Both factors were valid mitigating factors under normal circumstances but their value or weight must be considered in light of the whole circumstances of the case. Public interest was always a paramount consideration and only compelling extenuating circumstances could dislodge such consideration. (para 8)

(6) The fact that the appellant was the sole breadwinner of his family was not a mitigating factor as family hardships did not normally feature as a mitigating factor due to the fact that the appellant should have thought about them before committing the offence. (para 8)

(7) As for the fact that there were no complaints made by the victims of the appellant about having lost their monies in the illegal gambling enterprise, the reason being was that they had no legal recourse to enforce their unholy truce. They were never victims in the whole scheme. A more apt nomenclature assigned to them would be "accomplices" or *"participies criminis"*. That would be the only sensible and probable reason why none of the bettors came forward to complain to the police. (para 8)

(8) The appellant created layers of phony paper trail forming a seemingly legitimate trail of commercial transactions by forging documents belonging to his own company. He did them to cover his illegal tracks in banking in the ill-gotten monies into his company's bank account. By doing so, he hoped to cleanse his illegal proceeds and reintroduce them back into the normal and regular monetary/financial system. His case was a classic case of money laundering. Such elaborate steps taken by him must be taken into account in determining the duration of the sentence. Furthermore, he admitted to having spent RM1 million of the laundered monies. Those were aggravating factors. (para 8)

(9) The fact that the prosecution did not press for a deterrent sentence was irrelevant because the question of sentence was within the court's sole discretion. (para 8)

(10) The fact that the appellant was not claiming the RM314,729.79 did not entitle him to a lenient sentence. Based on the admitted facts, that sum being ill-gotten, the sessions judge did not have a choice but to allow the law pursuant to s. 55(1) AMLA to take its inevitable course. (para 8)

(11) A sentence in the form of an imprisonment term was in order for the set of circumstances pertaining to the commission of this offence by the appellant. The sessions judge had imposed

a sentence of two years' imprisonment out of a mandated maximum of five years against the appellant. Effectively, she had given a discount of three years' imprisonment. She had predicated her sentence on the public interest consideration having taken into account factors that could work in favour of the appellant. (para 8)

(12) The penalty order of RM1 million was a mandatory consequential order under s. 55(2) AMLA. That provision not only ensured that the appellant was denied of the future use of the ill-gotten gains but also that the ill-gotten gains expended or not traceable be paid back in an equivalent sum as a penalty. The omission by the sessions judge to state s. 55(2) as the source for the penalty order was not fatal because it was already provided for in law. In any event, s. 422 of the Criminal Procedure Code could be invoked to cure such an omission as it had not caused prejudice to the appellant. (para 8)

[Application for stay of execution not granted.]

Case(s) referred to:
Awang Gadur Hassan v. PP [1995] 1 LNS 20 HC ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Eng Song Hai v. PP [1953] 1 LNS 23 HC ***(refd)***
KWK (A child) v. PP [2003] 4 CLJ 51 CA ***(refd)***
Leong Kok Huat v. PP [1998] 4 CLJ 106 HC ***(refd)***
Lian Kian Boon v. PP [1990] 2 CLJ 799; [1990] 2 CLJ (Rep) 350 HC ***(refd)***
Lim Guan Eng v. PP & Other Appeals [1998] 3 CLJ 769 CA ***(refd)***
New Tuck Shen v. PP [1982] CLJ 38; [1982] CLJ (Rep) 606 HC ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 HC ***(refd)***
PP v. Leo Say & Ors [1985] 2 CLJ 155; [1985] CLJ (Rep) 683 HC ***(refd)***
Re Kwan Wah Yip & Anor [1954] 1 LNS 78 HC ***(refd)***
Tan Lay Chen v. PP [2000] 4 CLJ 492 HC ***(refd)***

Legislation referred to:
Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 4(1), (2), 55(1), (2)
Criminal Procedure Code, ss. 173(m), 294, 422

For the prosecution - Mohd Saifudin DPP
For the appellant - Dato' Shukri Mohamed; M/s Wan Haron Shukri & Nordin

Reported by Usha Thiagarajah

A

JUDGMENT

Abang Iskandar Abang Hashim JC:

[1] The accused person ('the appellant') was aggrieved by the sentence imposed on him by the Sessions Court Judge ('SCJ') sitting at Ampang, Selangor and had filed in an appeal which was heard and disposed by me on 10 December 2007. Having heard submissions from both sides to this appeal, I had dismissed his appeal. He had since filed in his notice of appeal against my said decision in the Court of Appeal. I now give my reasons why his appeal before me could not succeed.

[2] The appellant in this case had been charged and he had pleaded guilty, for an offence under s. 4(1) of the Anti-Money Laundering Act 2001 ('AMLA 2001') and punishable thereunder, having indicated to the said court that he had understood the charge and the consequences of his plea of guilty. He was duly convicted by the SCJ, on his own plea of guilty and on the facts as presented by the prosecution and admitted to by him. The charge that was preferred against the appellant read as follows (in the original language):

> Bahawa kamu di antara 2 Januari 2004 dan 14 Mei 2004 di Malayan Banking Berhad L1-03, L2-03. Level 1 & 2 Menara Maxisegar, Jalan Pandan Indah 4/2, Pandan Indah di dalam Negeri Selangor Darul Ehsan, telah melibatkan diri dalam pengubahan wang haram untuk jumlah sebanyak RM1,372,359.00 melalui akaun bank kamu di Malayan Banking Berhad bernombor 514383104700 dan oleh itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 4(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

[3] The facts, as they appeared in the grounds of judgment of the SCJ in record of appeal, need to be reproduced *in extenso* here for ease of reference and are as follows:

> Fakta kes di dalam Ex. P5 menyatakan pengadu dalam kes ini iaitu Sarjan Shahrulzaman bin Zamrud yang bertugas di Ibu Pejabat Polis Daerah Gombak, Selangor, semasa menjalankan siasatan kes di bawah Seksyen 6(3) Akta Pertaruhan 1953, telah mendapati bahawa saspek bernama Ong Seh Sen (No. KP: 700405-10-5239) (tertuduh) telah melakukan kesalahan di bawah Seksyen 4(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

Siasatan yang dijalankan di bawah Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 mendapati bahawa tertuduh Ong Seh Sen (No. K/P: 700405-10-5239) telah menerima hasil daripada aktiviti haram iaitu wang pertaruhan judi bolasepak haram berjumlah RM1,372,359.00 melalui akaun bank miliknya yang bernombor 514383104700 di Malayan Banking Berhad L1-03, L1-06, L2-03, Level Pandan 1 & 2, Menara Maxisegar, Jalan Pandan Indah 4/2, Pandan Indah, Selangor.

Bagi menyembunyikan sumber hasil daripada aktiviti haram tersebut adalah daripada pertaruhan judi bolasepak haram, tertuduh memalsukan sebanyak tujuh puluh lima (75) keping invois syarikat milik tertuduh iaitu Otto Century Enterprise yang beralamat di No. 8-B, Tingkat 1, Jalan 6/5, Taman Komersial, Pandan Indah, Selangor untuk menunjukkan bahawa kononnya jumlah RM 1,372,359.00 adalah hasil daripada aktiviti sah perniagaan syarikatnya. Hasil semakan dengan syarikat-syarikat yang dinamakan di dalam invois berkaitan tidak pernah membuat sebarang pesanan barangan daripada syarikat tertuduh dan tidak pernah membayar jumlah yang dinyatakan oleh tertuduh di dalam setiap invois tersebut. Tertuduh mengaku telah menggunakan keseluruhan hasil daripada aktiviti haram tersebut untuk kegunaannya sendiri kecuali jumlah sebanyak RM 314,729.79 yang telah berjaya disita di bawah Seksyen 50(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

Oleh yang demikian, tertuduh telah melibatkan diri dalam pengubahan wang haram iaitu menerima hasil daripada aktiviti haram iaitu wang pertaruhan judi bolasepak haram berjumlah RM 1,372,359.00 di antara 2 Januari 2004 hingga 14 Mei 2004 dan dengan itu tertuduh telah melakukan satu kesalahan di bawah Seksyen 4(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 sebagaimana di dalam pertuduhan alternatif.

OKT kemudiannya telah mengakui fakta kes.

Seterusnya TPR telah mengemukakan 75 keping invois yang terlibat di dalam pertuduhan yang ditandakan sebagai Ex.P6 (1-75). Invois ini juga telah diakui oleh OKT.

[4] Those facts were admitted to by this appellant and after hearing the submissions forwarded by parties at both ends of the bar table on sentence, the SCJ sitting at Ampang, had sentenced him to two years imprisonment and also to pay a fine (penalty) of RM1 million or, in default 12 months imprisonment.

[5] The learned counsel submitted numerous grounds in his petition of appeal against the sentence of the SCJ sitting at Ampang in this case. Basically, his submissions had been essentially premised upon three themes, namely (i) that the SCJ sitting at Ampang ought not to have imposed the sentence imprisonment, (ii) that the sentence that was imposed was excessive, and (iii) the imposition of a penalty of RM1 million.

[6] In the course of his submissions, the learned counsel, Dato' Shukri had indicated to this court that he had been instructed by the accused person to abandon ground no. 4 of his petition of appeal on the propriety of the conviction recorded against him on his own plea by the SCJ.

[7] The learned Deputy, Encik Mohd. Saifuddin had also replied to the submissions by the learned counsel and he had in the main, urged this court not to disturb the sentence passed by the SCJ and the order on penalty as they were appropriate and proper in the circumstances of this case.

[8] (i) The Issue Of Whether A Sentence Of Imprisonment Was Appropriate

(a) The SCJ sitting at Ampang had imposed a term of two years imprisonment on the accused person. It was submitted on his behalf by learned counsel that the court should consider invoking s. 294 of the Criminal Procedure Code ('CPC') on this offender and that a fine should be the next best option in the event that the court should decide that a binding-over order was inappropriate. In the course of prosecuting this appeal before me, it was vehemently submitted by learned counsel that the imprisonment sentence was misconceived and that it was not justified on the facts of this case. Learned counsel had submitted that looking at how the punishments are arranged in terms of sequence, under s. 4(1) AMLA 2001, the clear intention of Parliament was to impose a fine in the first instance, then only followed by the punishment in the form of imprisonment term. The punishment provisions as appear in the said s. 4(1) AMLA 2001 read as follows:

> …, commits an offence and on shall conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.

(b) He had also referred this court to the case of *Leong Kok Huat v. PP & Other Appeals* [1998] 4 CLJ 106, where Kadir Musa J, in a case involving the Immigration Act said that alternative penalties should be invoked only when evidence led had convincingly shown that the accused could 'buy' his wrongful act from the proceeds of his wrongful act directly or indirectly. If such evidence was not forthcoming, then a sentence of a fine would be in order. However, as was conceded by learned counsel, it was an *obiter dictum*. Be that as it may, I had found the observation by the learned Justice Gopal Sri Ram JCA, when delivering the decision of the Court of Appeal in the case of *Lim Guan Eng v. PP* [1998] 3 CLJ 769 to be more instructive, persuasive and if not downright binding on me. In that case, the court said that in an offence as serious as the act of sedition committed by the accused in the case before Their Lordships, it would not be sufficiently dealt with by imposing a sentence which comprised only a fine although the arrangement in the punishment section was similar to the one that appeared in s. 4(1) of AMLA 2001. There, His Lordship Gopal Sri Ram JCA had occasion to say:

> True, that s. 4 of the Sedition Act provides for a **fine in priority to a term of imprisonment as punishment.** But that is not to say that a court ought **never** to send a person to prison for sedition. **It all depends on the facts of each case.** (emphasis added)

(c) Each case, therefore, must be dealt with according to the dictates of the particular case as revealed by the facts surrounding its commission. To my mind, the fact that Parliament has, in its wisdom, provided for an option of a fine as one of the modes of punishment, only means that it has in its contemplation, envisaged that there may exist in a case, some compelling and extenuating circumstances which could well justify or indeed, warrant the sentencing court to choose to impose a sentence of a mere fine. But to say that the sentencing court must impose a sentence of a fine over a sentence of an imprisonment in a case, just on account of the sequence in the arrangement of the punishments in the relevant provisions, where the circumstances do not warrant the imposition of a fine as a mode of punishment would, to my mind, be going against the weight of high authority. Indeed, in

Lim Guan Eng's case *(supra)*, the learned Justices in the Court of Appeal had dismissed the appeal by the appellant who had appealed against his conviction and allowed the cross-appeal by the Public Prosecutor against inadequacy of sentence. Their Lordships had then proceeded to set aside the sentence of a fine that was imposed on the appellant "in favour of a term of imprisonment of 18 months from the first of April 1998." That being the state of the law, the SCJ sitting at Ampang having considered the circumstances pertaining to the commission of this case, came to the conclusion as follows, as could be seen at p. 64 of the record of appeal: "Oleh itu hukuman yang dikenakan bukan sahaja sebagai pengajaran kepada OKT tetapi juga kepada 'potential offender'". Thus the sentence of imprisonment complained of by the learned counsel was duly imposed by her.

(d) The learned counsel had also submitted that the sentence of imprisonment would more appropriately be reserved for offences of money laundering that involved elements of terrorism financing. According to him, the crime committed by the accused person involved no violence. Now, looking at the provisions as contained in the said s. 4(1) AMLA 2001, there was nothing therein to even justify such a suggestion as submitted before me on behalf of the appellant. No mention was made anywhere in that section that a sentence of imprisonment must only be meted out if the offence that had been committed involved elements of violence. Instead, to my mind, the provisions are generally worded so as to cast a net so wide, as to capture any acts of money laundering involving the various predicate offences as listed in the Schedule in AMLA. The said Schedule has contained a diverse litany of offences of various shades of *actus reus*, some involving elements of violence while others are totally devoid of such element. In the case before the SCJ sitting at Ampang, the predicate offence had been one of forgery of the 75 invoices belonging to the company owned by the appellant, within the period mentioned in the alternative charge, which was done by him in order to cover the illegal trail that was created when the proceeds of the illegal betting on the English Premier League matches were banked into the said company's bank account maintained at the Maybank branch at Pandan Indah. That was part of the act of layering and the act of reintroducing the illegal monies or the

dirty monies back into the legitimate financial system in our regular economy. Having done that the laundering was *fait accompli*. I found no merit in the submissions of learned counsel on this issue.

(e) In this case, a sum of RM1,372,359 of ill-gotten monies had been laundered and RM1 million from that sum had been admittedly expended by the appellant. I saw no merit therefore, in the plea made by learned counsel in his petition of appeal that the appellant had not benefited from this offence when in fact he had expended RM1 million of the ill-gotten monies, as was clearly borne out by the admitted facts. The fact that no criminal breach of trust was involved in the commission of this offence by the appellant would not matter. A charge for a money laundering offence can, at the instance of the Public Prosecutor, be a stand alone arraignment, as a person may be charged, as in this case, quite independent of there being a charge for a predicate offence against him.

(f) In my view, I saw no reason why the offence committed by the appellant should or ought not be caught squarely by the penalty provisions, imprisonment included, as contained under s. 4(1) AMLA 2001. As such, the submission by learned counsel on that issue could not be sustained.

(g) Having heard the submissions by both parties and having considered the facts and circumstances of this case, I was of the view that the SCJ sitting at Ampang did not err in imposing the sentence of imprisonment in preference over an imposition of a fine. The facts as they were in this case, definitely had been such that this offence, as committed by the appellant person could not be sufficiently dealt with by a mere imposition of a fine. A deterrent sentence was in order and a sentence of a fine could never be deterrent enough for this kind of offence involving laundering of proceeds derived from illegal gambling activities of such a magnitude, as in this case. Looking at the nature of the offence committed, and the magnitude involved, public interest would only be served, and served effectively, by the court imposing a term of imprisonment upon this appellant. The SCJ did not err when she did not consider imposing a bond under s. 294 CPC against the accused person. The facts, as admitted by the

A appellant in this case, would have taken itself out of the equation for such a consideration which if indeed it was considered at all, the chances of it being successful could only be regarded as remote.

B (h) Merely because an offender is a first offender and that he has pleaded guilty, does not mean that he deserves a lenient sentence in the form of just a fine. Under normal circumstances both those factors are valid mitigating factors, but their value or weight as such must be considered in the light of the whole C circumstances obtaining in each case. Public interest is always a paramount consideration and only compellingly extenuating circumstances can dislodge such consideration placed on public interest. The learned counsel had also submitted that the appellant was the sole bread winner of the family. The law is D quite clear on that matter. In *PP v. Leo Say & Anor* [1985] 2 CLJ 155; [1985] CLJ (Rep) 683, Justice NH Chan, after citing English cases, said that family hardships would not normally feature as a mitigating factor working in favour of the accused because he should have thought about them before committing E the offence.

(i) The learned counsel had also submitted that there were no complaints made by the victims of the accused person's illegal enterprise in the sense about they having lost monies in the F illegal gambling activities run by the appellant. A short response to that would be these people were in *pari delicto*. If there were such a thing as honour among thieves, this would serve as a fine example illustrating that paradox. No courts would enforce an illegal contract. As the maxim goes, let illegal things lie G where they have fallen. One who demanded equity must show that he had come with clean hands. So, those who had parted with their monies in the illegal gambling activities run by the appellant must have agreed to do so under a code of silence. Should they win a bet, they would walk away quietly with their H winnings, and likewise, should they lose, they would have to bite the proverbial bullet and move on nevertheless. Really, they knew very well that they had no legal recourse to enforce their unholy truce. They knew the price. They paid the price. They were never victims in this whole scheme. Indeed, 'accomplices' I or *'participies criminis'* would be a more apt nomenclature assigned to them. That would be the only sensible and probable reason why none of the bettors had come forward to complain to the police.

(ii) The Issue Of Whether The Imposition Of Two Years Imprisonment Was Manifestly Excessive

(a) The learned counsel had also submitted that the sentence of imprisonment of two years imposed by the SCJ sitting at Ampang was manifestly excessive in the circumstances

(b) The learned SCJ sitting at Ampang had given due consideration to factors that could work in favour of the appellant such as his plea of guilty and that he was a first offender. She had even taken into account the two other previous cases that involved sentencing under s. 4(2) of AMLA 2001, and though these cases were equally serious, she had rightly distinguished them from the facts of this case. In those other cases, suffice for me to say that, the respective offender was prosecuted not only for money laundering offences, but also for the predicate offences. So the basis for sentences was already dissimilar to begin with.

(c) This kind of offence is not easy to detect and let alone prove. Money laundering is indeed a relatively new form of commercial crime that had just been codified as criminal offences. It can be categorized as a form of white collar crime. Although apparently no physical violence would be normally be associated with the perpetration of this sort of crime, nevertheless its impact, if left unchecked could lead to economic ruins to any country. Albania would be one such example, if any amplification was necessary to illustrate such economic devastation caused by rampant money laundering activities that went unchecked. In this case, the appellant had created layers of phony paper trail forming a seemingly legitimate trail of commercial transactions by forging documents belonging to his own company. He had done all these in order to cover his illegal tracks in banking in the ill-gotten monies into his company's bank account held at the Maybank branch at Pandan Indah. By doing so, he had hoped to cleanse his illegal proceeds and reintroduce them back into the normal and regular monetary/financial system. Now, that was a classic case of money laundering. To my mind, these elaborate steps that had been taken by this accused person must be taken into account in determining the duration of the sentence. On top of that, he had admitted to having spent RM1 million of the laundered monies. These, to my mind, were aggravating factors.

(d) It was also complained before me by learned counsel, during hearing of this appeal that the SCJ had been unduly harsh in her sentence that was imposed on the appellant when in fact the prosecution had not pressed for a deterrent sentence before her. According to learned counsel, the prosecution had left it to court to impose an appropriate sentence. The record of appeal at p. 48 would bear witness to that fact and indeed it was so.

(e) This issue as raised by the learned counsel had conjured two important points in the matter regarding sentencing by the lower courts. The first of the said two points resided in the Criminal Procedure Code ('CPC') and, the second had been well articulated and had dwelled in case law.

(f) As regards the first point, under s. 173(m) of the CPC, the court must impose a sentence 'according to law'. In *PP v. Jafa Daud* [1981] 1 LNS 28, Mohamad Azmi J (as he then was) had ruled that 'a sentence according to law' meant not only must the sentence that was passed be within the limits of the punishment as provided, but in doing so due regard must be given to established legal principles on sentencing. In other words, the sentence must not be one that was a product of caprice or arbitrariness on the part of the sentencer. As sentencing was a judicial process premised upon an exercise of discretion, at the risk of stating the obvious, it must be exercised judiciously.

(g) As regards whether the court in coming to a sentence was bound by the submissions of the deputy, the law on this matter has been well settled. In the case of *Awang Gadur Hassan v. PP* [1995] 1 LNS 20, Justice Tee Ah Sing had said that the fact that the prosecution did not ask for a deterrent sentence was irrelevant because the question of sentence was within the court's sole discretion. Indeed I was reminded too of the judgment of Wan Yahya J (as he then was) in the case of *New Tuck Shen v. PP* [1982] CLJ 38; [1982] CLJ (Rep) 606. This case has been the authority for the proposition that in Malaysia, the courts were not concerned with the plea bargaining which might have taken place between the defence and the prosecution, regarding the form of the eventual sentence that should be visited upon the accused person who had agreed to plead guilty. The following quote from his speech would illustrate the usual manner as to how this erstwhile judge had handled the issue that was before him, with admirable candour:

> The right to impose punishment on the guilty party is absolutely the discretion of the Court. It will exercise that power judicially but will not tolerate any encroachment or even semblance of encroachment either by the prosecution or the defence in respect of such right. An agreement between the prosecution and the defence as to the nature of sentence to be imposed on the accused person **creates no obligation** on the Court and … In this case Counsel should have known that even if the prosecution had kept its promise (assuming that it did so promise), **not to press for deterrent sentence,** such promise would be of little or no use **as sentences are known to be within the absolute province of the Court** and is only good for pricking the conscience of the defaulting party. (emphasis added)

(h) And deep into the same judgment, the same learned Justice had observed thus:

> As mentioned earlier, the power to impose any sentence lies with the Court and not with the learned Deputy Public Prosecutor or the defence Counsel. If the Court were to heed the behest of the Deputy Public Prosecutor on sentence, there would probably be lesser men walking in the sunshine today.

(i) The learned counsel had also complained that as the appellant would not be claiming the RM314,729.79, he should therefore be entitled to a lenient sentence. Looking at the admitted facts, that sum being ill-gotten, the SCJ had no choice in the matter because the law as contained under s. 55(1) AMLA 2001 had to be allowed to take its inevitable course. I did not think that the accused person could claim any credit there.

(j) So the courts, just like what the SCJ sitting at Ampang had done in this case, would not be not bound by what the deputy or the defence had urged them what to do or what not do in the matter of passing a sentence, but rather, they would be duty bound to pass a sentence 'according to law' which meaning was well amplified to us by Justice Mohamad Azmi J (as he then was) in the *Jafa bin Daud*'s case *(supra)*. In essence, the truth of the matter must necessarily be that it would be the duty of parties to submit before the judge to the best of their abilities in the interests of whom they represent, but at the end of the day, according to Justice Wan Yahya J (as he then was), in the *New Tuck Shen*'s case *(supra)*, it would lie entirely with the

judge to decide on what form, in the circumstances before it, the sentence must eventually take. That, to my mind should clearly put the said matter complained of, in its proper and correct perspective. Therefore, I saw no merit in the objection taken on that issue by the learned counsel.

(k) The learned counsel had also submitted that the SCJ sitting at Ampang had taken into account extraneous considerations when passing this sentence in this case. I had failed to see where she had done that. I should think that her reference at p. 64 of the records of appeal that she had referred to other serious offences such as drug trafficking and arms smuggling, should be taken in context as she was commenting on the types of predicate activities that would culminate in money laundering of the proceeds. I saw no prejudice caused to the appellant by that observation. Definitely, there was nothing that appeared in the records of this appeal which was even close to the circumstances that surrounded the facts in the case of *Lian Kian Boon v. PP* [1990] 2 CLJ 799; [1990] 2 CLJ (Rep) 350 which was cited by learned counsel. Reading the facts of *Lian*'s case *(supra)*, none could usefully quarrel with the finding made by the learned Judicial Commissioner Richard Talala that the Magistrate must have been influenced by the submissions put forth by the prosecuting officer that were both extraneous to the case and highly prejudicial to the offender. I saw no such parallel could be drawn in the appeal before me. As such, I saw no merit in that issue as raised by learned counsel.

(l) So, was she excessive in her sentencing of the accused person, as was claimed by learned counsel?

(m) To answer that question, one only has to remind oneself of the judgment of Raja Azlan Shah Ag LP (as His Highness then was) in the celebrated case of *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139, where the Federal Court then was faced with the same complaint by the appellant appearing before them. Sentencing was basically an exercise of discretion by the sentencing judge and I believed that case of *Bhandulananda Jayatilake (supra)* would best summarize the dynamics involved in the sentencing process and the role of the appellate judge in dealing with an appeal on sentence emanating from the lower courts. This was how His Lordship Raja Azlan Shah Ag LP (as His Majesty then was), had then articulated the issue:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had the occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar acts may sometimes reach different conclusions (see *Jamieson v. Jamieson* [1954] AC 525, 529) It is for that reason that some very conscientious judges have thought it to be their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore the sentences do vary in apparently similar circumstances with the habit of the particular judge. It is for that reason also that this court had said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference.

A B C D E

And, if I may add here, that was the Federal Court that was talking about how slow it would interfere with a sentence from the lower court. Only clear and cogent reasons could justify such interference by an appellate court and from what His Lordship Raja Azlan Shah Ag LP (as His Majesty then was) had said, only something bordering on an illegality such as, an "error of law of some description" could trigger a reversal of a sentence imposed by the lower court.

F G

(n) As such, I had agreed with the learned SCJ sitting at Ampang that a sentence in the form of an imprisonment term was in order for the set of circumstances pertaining to the commission of this offence by the accused person. Now, she had imposed a sentence of two years imprisonment out of a mandated maximum of five years against the accused person. He had pleaded guilty and clearly and surely she had taken that into account in assessing the proper sentence to be imposed in the context of the overall considerations of the principles on sentencing. There has been no precedent on sentencing emanating from the superior courts in this country that could

H I

be used by the SCJ sitting at Ampang in a money laundering case such as this. Be that as it may, based on her consideration of the facts before her, I would not say that she had committed an error of any description which would have exposed her decision on sentence open to interference by this court. To her credit as well, she had taken into account the paramount consideration of public interest and the need for public to be protected from insidious activities such as the one engaged in by the appellant. Under such circumstances, she had decided to impose a sentence of imprisonment because the circumstances of this case before warranted the kind of sentence that would serve as a punishment against this accused person and also a deterrent to would be offenders who could be contemplating committing the same offence. I agreed with her that nothing less than an imprisonment term would suffice as a punishment in this case. In passing sentence, the SCJ also referred to the fact that money laundering was becoming a global problem and that if left unchecked could go a long way in demolishing the good reputation of any country and that if left unchecked, it could give the erroneous perception that committing 'crimes do pay'. So it was in the public interest that a deterrent sentence be imposed in this case. Based on those considerations, she had imposed the sentence of two years imprisonment on the accused person effective from the date of passing of sentence, namely 8 August 2007, although he had pleaded guilty and was a first offender. Effectively, she had given him a discount of three years in terms of imprisonment. She had predicated her sentence on the public interest consideration having taken into account factors that could work in favour of the accused person. That was her sense of justice and, in all fairness, I do not believe that I could fault her for that.

(iii) The Issue Of The Penalty Of RM 1 Million Which Had Been Dissipated

(a) That must now bring us to the order of penalty of RM1 million imposed by the SCJ sitting at Ampang against this accused person. It must be noted as well that out of the RM1.3 million that was laundered by this accused person, only about RM300,000 was traceable by the investigators just in the nick of time and that amount had been duly seized. The remaining sum of RM1 million had been disposed off or dissipated by the accused person as was admitted by him in the facts of the case in court before the SCJ.

(b) One must never lose sight of the spirit that permeated throughout the fabric of AMLA 2001. That spirit had been to deny a money launderer from enjoying or benefiting from his ill-gotten gains by engaging in criminal activities that constituted the predicate offences as per the Schedule in AMLA 2001. Looking at the way AMLA 2001 was structured as a comprehensive legal framework, it was clear and it was never left open to any doubt that the way forward to combat money laundering was *via* a comprehensive multi-pronged approach.

(c) AMLA 2001 had set out to deal with the convicted money launderer in such a way that he would be punished personally in terms of imposition of a fine or imprisonment or both; that all the tools or properties used in the commission of the offence shall be subject to forfeiture; and that in terms of ill-gotten profits generated from his criminal activities, they too shall be subject to forfeiture, and if the ill-gotten property had been dissipated, the offender shall be ordered to pay a penalty sum which, in the opinion of the court, was equivalent to the sum that had been dissipated or disposed off. In other words, the concept that was driving this crusade against money laundering had been one that had sought out to ensure that a convicted money launderer would be stripped of his ill-gotten gains, past, present and future, in terms of their uses by him. It therefore would have a triple-whammy kind of aftershock effects to drive home the point that it was never worth the trouble at all committing an offence called money laundering. Some even described it as poetic justice of some sort.

(d) So in AMLA 2001, besides providing for a section that penalized the offender for committing the crime under s. 4(1) AMLA 2001, it also ensured that whatever ill-gotten gains that had been derived from the commission of the predicate offence must also be forfeited as provided for under s. 55(1) AMLA 2001. If such ill-gotten gains had been disposed of [dissipated] by the offender or could not be traced, then the court before which the conviction was had, must order the offender to pay as a penalty, a sum which, in the opinion of the court, was equivalent to the sum that had been disposed of or was not traceable, and that such penalty be recoverable as a fine. This had found legislative expression under s. 55(2) AMLA, 2001 which read as follows:

A (2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a **penalty** a sum which is **equivalent** to, **in the opinion of the court,** the value of the property, and any such penalty shall be recoverable **as a fine.** (emphasis added)

B

(e) Looking at s. 55(2) AMLA 2001, it would appear to me that such order as envisaged there under was a mandatory consequential order which the court, in the position of SCJ sitting at Ampang in this case, must make, pursuant to a C recording of a conviction. It would matter not whether the conviction has been obtained by way of a full trial culminating in a finding of guilt by the competent court or by way of recording a plea of guilty by the offender himself. The gist of the matter was that the court shall order the accused person to D pay, as a penalty, a sum which was, "in the opinion of the court" equivalent to the value of the ill-gotten gains which, *inter alia*, had been dissipated by the offender, and that such a penalty shall be recoverable as a fine. This provision ensured that not only would the offender be denied of the future use of E his ill-gotten gains, but it had gone one step further by ensuring that even ill-gotten gains that had been expended or not traceable shall be paid back in an equivalent sum as a penalty. In this case, the facts as admitted to by the accused person had shown that he had spent RM1 million out of the F sum of about RM1.3 million which were admitted as laundered monies. Once the offender had admitted to a fact, there existed no necessity for the prosecution to prove the same (see the case of *Eng Song Hai v. PP* [1953] 1 LNS 23, per Bellamy J and in the case of *Tan Lay Chen v. PP* [2000] 4 CLJ 492, Augustine G Paul J (as he then was) had said that in such a case where the accused person had pleaded guilty, there was no need to call any witness to give evidence. In my view, before the court makes such order under subsection (2), it would be entitled, in the course of forming its opinion, to rely on the facts and H materials as admitted before it by the offender. Let us look at the facts of this case to see whether there were sufficient materials for SCJ sitting at Ampang to form an opinion on an equivalent sum of RM1 million as a penalty that she was obligated to order against the appellant. The first material must I be the admitted facts which contained the circumstances

surrounding the ill-gotten gains, and secondly, the 75 invoices that the appellant had falsified amounting to RM1,372,359. Taken together, the SCJ was entitled to come to her opinion that RM1 million must be paid back by the appellant being the equivalent amount to that which had been disposed off by him. Although the SCJ did not state s. 55(2) AMLA, 2001 as the source for her making that order, I was of the view that such omission was not fatal, because that is provided for in the law, specifically under s. 55(2) AMLA 2001 and most importantly, the appellant was not prejudiced by such omission. In any event, the provisions under s. 422 CPC could be invoked to cure such an omission as it had not caused prejudice to the appellant.

(f) Having perused through her grounds for her sentence against the appellant, I had found that the sentence passed by the SCJ had, as its components the necessary elements of punishing the appellant as well as elements of deterrent against would be offenders. The appellant had complained against it as being overly harsh. At first brush it may seem to be so, but under the circumstances surrounding this case, to my mind, the SCJ sitting at Ampang was well justified in doing so. She had, in outweighing the plea in mitigation in favour of the public interest with a desire to safeguard the public from the evils that could befall the society if money laundering in a magnitude as committed by the appellant was not dealt with a severity that would not only serve as a punishment to the appellant, but also as a deterrent to would-be like offenders. I agreed with her that such consideration must receive the greatest weight. On the totality of the circumstances obtaining before her regarding this case, I did not consider the sentence that had been passed by her could, in any manner conceivable, be described as being overly or manifestly excessive as would warrant any interference by me. In the words of His Lordship Raja Azlan Shah Ag LP (as His Majesty then was) in the *Bhandulananda*'s case *(supra)*, it must be shown that the court below was "embarking on some unauthorized or extraneous or irrelevant exercise of discretion" before a discretionary judgment of this kind ought to be reversed by this court. I did not see such an abuse of her discretion on the part of the SCJ sitting at Ampang in this

A case. Indeed, on the matter of ordering the RM1 million penalty, she had no discretion not to so impose the same because subsection 55(2) AMLA 2001 has placed an obligatory duty on her in such a circumstance.

B (g) That being the case, I had affirmed the decision of the SCJ sitting at Ampang, in its entirety and had dismissed the appeal by the appellant accordingly.

Application For Stay Of Execution

C **[9]** The appellant had then also applied for an order of stay of execution against my decision. He had cited among others the fact that there has been no precedent on sentencing for an offence under AMLA 2001. He also said that it would take about two years before this appeal could be heard by the Court of Appeal and as his D sentence was for two years, most probably, by the time this appeal was finally heard by the Court of Appeal, it would be sheer academic in effect. The learned deputy submitted that the appellant must show special circumstances as enunciated in the case of *Re Kwan Wah Yip* [1954] 1 LNS 78. He also submitted that once the E appellant had been convicted, the presumption of innocence does not operate in his favour any longer. In this case, the appellant had pleaded guilty in the lower court. I had confirmed his conviction after hearing his appeal. Such being the case, the presumption of innocence did not work in his favour any more. The bone of F contention of the appellant would appear to be that no custodial sentence should have been imposed on the appellant for this offence. With due respect, I did not think that would be reason enough for me to grant a stay of execution. As regards the possibility of longish lapse of time before this appeal could be heard G by the Court of Appeal, I noted that recently, there had been an increase in the number of Justices in the Court of Appeal. In that respect, I would need only to quote the words of the learned Justice Augustine Paul JCA [as he then was] in the case of *KWK (A child) v. PP* [2003] 4 CLJ 51, thus: "Moreover, the appellant could also H apply to the President of the Court of Appeal for an earlier date of hearing. Consequently, it would be premature to conclude, at this stage, that the appeal would take a long time to be heard."

I